IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.184 OF 2003

Sunil Eknath Trambake
Occupation - Service,
R/o Divrewadi, Panchvati
Nasik .. Petitioner.

Vs.

Leelavati Sunil Trambake
Occupation - Service,
R/o. Dwara-Vishnu Mahadev
Gaikwad, N-41, J-2-15/4
Yojana, Moti Chowk,
New Cidco, Nasik - 9. .. Respondent.

Ms.Sharvari Y.Jahagirdhar for the petitioner.
Mr.P.N.Joshi for the respondent.

CORAM : D.B.BHOSALE, J.

DATED : 1ST DECEMBER, 2005

ORAL JUDGMENT:

. Heard learned counsel for the parties.

2. This petition is directed against the order dated 29.11.2002 passed by the Joint Civil Judge, Senior Division, Nasik on the application Exhibit-173 filed in H.M.P. No.195/95 by which the said application filed by the respondent-wife seeking D.N.A. test of the petitioner and child - Rupesh was allowed. The petitioner was directed to make himself available for conducting DNA test and also to secure the presence of Rupesh for the said test before Civil Surgeon, Civil Hospital, Nasik on

12.12.2002. This Court, however, while admitting the petition had granted stay to the execution of the impugned order.

3. The factual matrix that may be relevant and material for considering the challenge, briefly stated, is as follows: The petitioner and respondent are husband and wife. Their marriage was solemnised on 4th April, 1986. They were blessed with a female child. Due to some differences and events that occurred prior to 1995 the petitioner-husband filed H.M.P.No.195/95 under section 13 of the Hindu Marriage Act for divorce. The case set up by the respondent-wife is that on 25th March, 1996 the petitioner solemnised second marriage with one Smt.Meena Chandrakant Nirphale and after their marriage fathered a son - Rupesh, who was born on 3rd December, 1997. The petitioner, however, denied the allegations and particularly the paternity of the child - Rupesh. In view thereof, after the evidence was laid by the parties and before arguments were heard the application - Exhibit-173 was filed by the respondent-wife seeking DNA test to determine fatherhood of the petitioner. The trial Court allowed the application holding that in the interest of justice DNA test would be necessary and that will give an opportunity to the

respondent-wife to establish her case that the petitioner leads an adulturous life.

4. Ms.Sharvari Jahagirdhar, learned counsel for the petitioner-husband vehemently submitted that the scope of enquiry in the marriage petition filed by the petitioner is very limited and the trial Court will have to decide whether he is entitled for divorce as prayed for in the petition and that the DNA test to establish paternity of Rupesh need not be conducted. She further submitted it is well settled that DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given. The present case does not fall in the aforesaid category. Ms.Jahagirdhar further submitted that Meena and Rupesh are not party to the proceedings and, therefore, the order directing Rupesh to submit himself to the test is in violation of the principles of natural justice. On the other hand Mr.Joshi, learned counsel for the respondent-wife submitted that DNA test of the petitioner and child would be necessary to prove the allegation that the petitioner is leading adulterous life after deserting the respondent-wife and is, therefore, not entitled for divorce. In the alternative he submitted that since the petitioner is not submitting to the test an adverse inference may be

drawn against him holding that Rupesh is his son from Smt.Meena.

5. The core question involved in this petition is whether DNA test, in the facts and circumstances of the present case, is necessary. Indubitably, Deoxyribonucleic acid test, which is commonly known as 'DNA' test, is useful to determine the question of disputed paternity. Though the Court is empowered it cannot order a person to submit to such a test as a matter of routine and only in deserving cases such direction can be given. The Court is expected to exercise such discretion/power, in matrimonial cases, only when such a test is in the best interest of the child. The courts should exercise this discretion wisely. The object of the court always is to find out the truth. It is true that no person can be compelled to give a sample of blood for analysis against his/her will. However, in the event of refusal it is open for the Court to draw an adverse inference.

6. Merely because either of the parties have disputed a factum of paternity does not mean that the court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the court finds it

impossible to draw an inference or adverse inference on the basis of such evidence on record or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the court can direct such test. DNA test, in any case, cannot be directed as a matter of routine. The courts should record reasons as to how and why such test in the case is necessary to resolve the controversy and is indispensable. That is necessary since a result of such test, in matrimonial and succession cases, being negative will have an effect of branding a child as a bastard and the mother as an unchaste women as noted in **Goutam Kundu V. State of West Bengal and Anr.(1993) 3 SCC 418**. That may also adversely affect the child physocologically. The courts, however, should not hesitate to direct DNA test if it is in the best interest of a child.

7. In the present case, the respondent-wife is seeking DNA test not in the interest of the child but in her own interest to establish that the petitioner-husband lives in adultery and is, therefore, not entitled for divorce. The learned Judge has not recorded the reasons as to why DNA is

indispensable and that the other evidence produce on record is not sufficient to draw an inference or adverse inference in favour or against either of the parties. In the present case the documentary evidence in the form of birth certificate and school record is already produced on record which, according to the respondent, reflects that the petitioner and Meena are parents of child - Rupesh. The learned Judge has not recorded its opinion in respect of that evidence. I do not wish to express any opinion on merits of the case, However, in my opinion, in the absence of sufficient reasons for holding the DNA test necessary, to resolve the controversy involved in the matter the impugned order is liable to be set aside.

8. Even if we look at the question involved from another angle the impugned order deserves to be quashed and set aside. According to the respondent-wife, Rupesh is the son of Meena. Neither Meena nor Rupesh are party to the proceedings. They were not represented in the proceedings and the impugned order was passed behind their back clearly in violation of the principles of natural justice. The court cannot direct DNA or any such test without hearing the person concerned irrespective of the fact whether he is minor or major. If such a person is minor,

he should be heard through natural guardian.

9. The respondent-wife wishes to prove that the petitioner-husband has married Meena and Rupesh is their son. Keeping that in view, even if the result of DNA test renders positive that would not help the respondent-wife to prove the alleged second marriage of the petitioner-husband. Looking to the case from all angles I am satisfied that the DNA test in the present case is not necessary and is also not in the best interest of the child - Rupesh. In the circumstances this petition is allowed. The impugned order is set aside. The trial Court is directed to proceed with hearing of the petition and dispose it of as early as possible and preferably within six months from the date of receipt of this order. Rule is, accordingly, made absolute. No order as to costs.

(D.B.Bhosale, J.)